No. 91-601

IN THE

SUPREME COURT OF THE UNITED STATES

October 1991 Term

EDWARD J. ROMERO,

Petitioner,

v.

ALBERT AGUAYO, DONALD MOSER, JAMES SCAMMAN, and SCHOOL DISTRICT NO. 1, CITY AND COUNTY OF DENVER,

Respondents.

Petition for Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Cases:

Federal Statutes:

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I. THE DISTRICT COURT CORRECTLY DECIDED ROMERO'S FEDERAL CLAIMS WERE NOT PRECLUDED BY THE STATE ADMINISTRATIVE PROCEEDINGS.

Respondent's mistakenly assert Romero's federal claims should have been dismissed because of the preclusive affect given to issues or claims already determined in a state administrative proceeding. Brief in Opposition, p. 7 n.3.

Judge Jim Carrigan of the district court, relying on *Marino v. Willoughby*, 618 P.2d 728 (Colo. App. 1980), correctly decided Romero's federal claims were not barred by the doctrine of *res judicata*. In *Marino*, the plaintiff appealed his discharge from the city police force. He was represented by counsel at an evidentiary hearing before the City's Civil Service Commission which upheld the discharge. Rather than seek review of

the Commission's decision, the plaintiff filed at § 1983 action. The trial court granted the defendant's motion to dismiss based on *res judicata* arguing plaintiff could have raised the constitutional issues in the hearing before the Commission, failed to do so, and was thereby barred from raising them in action for damages. The Colorado Court of Appeals overruled the trial court, holding the City Charter did not authorize the Commission to grant monetary relief for violations of federal rights established by § 1983.

> The Commission had no jurisdiction at that time to resolve completely the federal statutory and constitutional claims Marino raises here . . .
>
> . . . Even if Marino had presented to the Commission the ground underlying the federal claims here asserted as defenses to dismissal, a decision by the Commission to

> reinstate Marino could not have resolved completely his claims for damages against Willoughby and [the City of] Pueblo based on alleged violations of federal rights.

Marino, 618 P.2d at 730 and 731 (Emphasis supplied).

The facts are identical in this case. The hearing officer was not empowered to "resolve completely" Romero's constitutional claims. Rather, he was only authorized to make findings of fact and issue a recommendation to retain or discharge. C.R.S. § 22-63-117(a).

The administrative proceeding in this case concerned only whether cause existed to terminate Romero. Romero did not press his constitutional claim in the tenure dismissal hearing. It matters not that Romero could have raised the claim in the hearing because the hearing

officer was not authorized to decide and remedy the constitutional claim. For that reason alone, the hearing can not be equated with a judicial trial.

Judge Carrigan decided the Colorado tenure act did not provide for complete resolution of Romero's constitutional claims. The doctrine of *res judicata* is inapplicable to this case. Thus, the hearing officer's factual findings have no preclusive affect upon the district court, the Tenth Circuit, or this court.[1]

II. THE CAUSATION ANALYSIS URGED BY ROMERO IS APPROPRIATE.

Respondents assert the causation inquiry in a § 1983 case looks to the

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[1]Judge Matsch, in granting summary judgment, did not challenge Judge Carrigan's decision regarding the applicability of *res judicata* to this case.

reason for a challenged action and not the chain of events leading up to it. Brief in Opposition, p. 13. The respondents' analysis of the causation requirement under § 1983 is overstated.

There must be a showing of causation between the unconstitutional act and the subsequent harm. Causation in the traditional negligence "but for" sense is an element of a claim under § 1983. App. A130. It is accepted that § 1983 is to be read against the background of tort liability that makes a man responsible for the natural consequences of his action. *Monroe v. Pape*, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492, 505 (1961), *overruled in part on other grounds, Monell, et al. v. Dept. of Soc. Svcs. of the City of New York, et al.*, 436 U.S. 658, 98 S.Ct. 2108, 56 L.Ed.2d

611 (1978); *Stringer v. Dilger,* 313 F.2d 536, 540 (10th Cir. 1963); *Jones v. City of Chicago,* 856 F.2d 985, 993 (7th Cir. 1988); *Goodwin v. Metts,* 885 F.2d 157, 162 (4th Cir. 1989), *cert. den.*, ___ U.S. ___, 110 S.Ct. 1812, ___ L.Ed.2d ___ (1990). More is involved in proving a claim against a governmental institution but the "but for" causal analysis is not excluded. Cases relied upon by the respondents before the Tenth Circuit confirm this. *Harris v. City of Pagedale,* 821 F.2d 499, 507 (8th Cir. 1987), *cert. den.*, 484 U.S. 986, 108 S.Ct. 504, 98 L.Ed.2d 502 (1987), *reh. den.*, 484 U.S. 1083, 108 S.Ct. 1066, 98 L.Ed.2d 1027 (1988), states:

> Municipal liability under § 1983 cannot be premised on the <u>mere</u> fact that the unconstitutional act resulted from a municipal custom in a "but for" sense; it must be

> shown that the act was taken "pursuant to" the custom, i.e., that the municipal custom was "the moving force of the constitutional violation. *Pembaur*, 106 S.Ct. at 1299-1300 n.11 (plurality opinion) (citation omitted); *Monell*, 436 U.S. at 694, 98 S.Ct. at 2037. (Emphasis supplied).

Pembaur v. City of Cincinnati, et al., 475 U.S. 469, 482 n.11, 106 S.Ct. 1292, 1299-1300 n.11, 89 L.Ed.2d 452, 464 n.11 (1986), states:

> Although there was no opinion for the Court on this question, both the plurality and the opinion concurring in the judgment found Plaintiff's submission inadequate because she failed to establish that the unconstitutional act was taken *pursuant* to a municipal policy rather than <u>simply</u> resulting from such a policy in a "but for" sense. (Emphasis in the original and supplied).

Ware v. Unified School Dist. No. 492, Butler County, State of Kansas, 902 F.2d 815, 819 (10th Cir. 1990), recognizes that:

> . . . a direct causal link must exist between the acts of the governing body sought to be held liable and the alleged constitutional deprivation
> . . .
>
> a municipality can be liable under § 1983 only where its policies are the "moving force [behind] the constitutional violation."

Nothing in *Ware* indicates the causation inquiry looks to the reason for the challenged action at the exclusion of the chain of events leading up to it.

There are two parts to the causation inquiry in establishing a § 1983 claim against a governmental institution. There must be proof of "but for" causation of the alleged deprivation. 42 U.S.C. § 1983; *Monroe v. Pape, supra; Malley v. Briggs,* 435 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986); *Stringer v. Dilger, supra; Jones v. City of Chicago, supra; Goodwin v. Metts, supra.* In

addition, there must be proof that the act causing the deprivation was done pursuant to or reflects official policy. *Pembaur v. City of Cincinnati, et al., supra; Harris v. City of Pagedale, supra; Ware v. Unified School Dist. No. 42, Butler County, State of Kansas, supra.* Thus, Romero's reliance on the factual history and chain of events leading to his termination is appropriate. See also *Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450, 465 (1977) (One factor to be considered is the "historical background of the decision").

III. THE STIPULATION THAT THE BOARD RELIED SOLELY UPON THE HEARING OFFICER'S FINDING AND RECOMMENDATION DOES NOT BREAK THE CHAIN OF CAUSATION BETWEEN ITS ACTION AND THE IMPROPER MOTIVE OF AGUAYO.

Romero has conceded all along and it is undisputed that absent Aguayo's unlawfully motivated conduct, Romero could have been discharged. The relevant inquiry, however, and what Romero has always contested, is whether absent Aguayo's unlawfully motivated conduct, Romero would have been discharged.

Romero does not rely only upon a quote in a newspaper article to show the respondent district had a policy of always terminating teachers brought up on charges under the Teacher Tenure Dismissal Act. Part of the record before the Tenth Circuit was deposition testimony of the same board of education president who gave the newspaper interview. In his testimony, the president admitted making the statement in the paper, that he was quoted

correctly, and confirmed that he knew of no teacher who had gone through the tenure dismissal proceeding who had been retained.

Q Can you identify Exhibit 1?

A Yes. It was an article that appeared in one of the local papers.

Q It was an article that appeared on June the 14th, 1989 on the Rocky Mountain News; is that not correct?

A If that's what the date says. I'm not sure about the exact date of --

Q Anyway, you recall the article? You've read it?

A Yes.

Q And you are quoted in that article, am I not correct?

A Yes.

Q Were you quoted correctly?

A As far as I recall, yes. . .

> Q Well, my question is: Do you recall any tenure dismissal proceeding in which you have been involved as a board member in which the teacher has not been dismissed?
>
> A No.
>
> Q And that includes, does it not, those cases in which the administrative law judge may have recommended retention?
>
> A Yes.

The board's policy was also confirmed by another board member, Paul Sandoval, in his deposition, which was part of the record before the Tenth Circuit:

> Q Well, do you ever remember a tenure dismissal proceeding during your time on the school board where charges were brought, there was a hearing, there was a recommendation, either of retention or dismissal, and the case resulted in anything other than a dismissal of the teacher?
>
> A Not to my knowledge, no.

Subsequent to the discovery revealing the respondent district's policy of always

terminating teachers subjected to tenure proceedings, Romero sought release from the stipulation in the district court. The district court never decided whether Romero would be relieved from the stipulation. Instead, the district court entered summary judgment for the respondents.

The stipulation says nothing about the motivation of the respondent district's board of education. The stipulation states:

> Relying solely on Mr. Snider's finding and recommendation, the board of education voted to dismiss plaintiff.

(Emphasis supplied). A distinction exists between reliance and motivation. Webster's Ninth New Collegiate Dictionary (1984) defines "rely" as "to have confidence based on experience" or "to be dependent". Certainly, under Colorado

law, to terminate a teacher, the board of education must first have a recommendation from an administrative law judge subsequent to a due process hearing. C.R.S. § 22-63-117(10). However, reliance or dependence upon the recommendation of an administrative law judge says nothing about the motivation of the board of education. Webster's defines "motivation" as "the condition of being motivated" or "a motivating force, stimulus or influence". In turn, "motive" is defined as "something that causes a person to act".

Romero has previously demonstrated Aguayo's unlawfully motivated conduct, setting in motion the process which inevitably led to his discharge. The facts also show the policy of the board of education to go beyond the official

record before the hearing officer, as well as its knowledge of the history of the district's relationship with Romero. Under *Mt. Healthy School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1987), wherever improper motive in retaliation for constitutionally protected conduct plays any part, it is not enough for the defendant to show that the same result can be justified. Rather, the defendant must show that the same result would obtain in any event.

Therefore, in any mixed motive case, it will always be the case that the result can be justified, which is all plaintiff conceded when he admitted below that 1) the administrative procedure was fair, and 2) that the result would have been sustained upon appellate review as supported by substantial evidence.

This does not, however, concede that in any event the same result would obtain. If there had been no improper motivation to investigate and charge, would there have been a charge in any event? Plaintiff at least presented evidence to raise a question of fact in this particular not capable of resolution on a motion for summary judgment. He showed that charges of no consequence when first made to his principal, Moser, became a predicate for his discharge when Aguayo took over the investigation. Even the Hearing Officer suggested probation should be considered, which is hardly consistent with what respondents characterize as his "most damning conclusions."

Moreover, the improper motivation of Aguayo is clearly shown to pervade the

entire process, not just the investigation. Aguayo was a witness in the hearing. According to Sandoval's deposition testimony, Aguayo may well have lobbied the final discharge vote.

The stipulation that the Board relied solely upon the hearing officer's finding and recommendation is not a stipulation to other than what appears of record in the board's order. What motivates a decision and the statement of reasons given for the decision are not one and the same.

In light of the facts and law previously argued to this court, the stipulation does not break the chain of causation between the actions of the board of education in voting to dismiss Romero and the improper motive of Aguayo. The reliance of the board of education

upon the hearing officer's finding and recommendation says nothing about its motivation.

IV. CONCLUSION

For all of the reasons expressed in Romero's petition for writ of certiorari and in this reply brief to respondents' brief in opposition to the petition for writ of certiorari, Romero's petition for writ of certiorari should be granted.

Respectfully submitted,

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